International Arbitration, Investment Protection and EU State Aid Rules: the General Court of the EU Annuls the European Commission’s State Aid Decision in the Micula Case

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In a long-awaited ruling of June 18, 2019, the General Court of the EU (GCEU) annulled the European Commission’s State aid 2015 decision in the Micula case (joined cases T-624/15, T-694/15 and T-704/15).

The factual background

Romania was in a very difficult economic, financial and social situation following the collapse of the communist regime in 1989. In its efforts to boost regional development, Romania adopted in 1998 and 2000 various incentives to investors willing to invest in certain disfavored areas. Relying on the existence of these incentives, Viorel and Ioan Micula, Swedish citizens, through several of their companies, made substantial new investments in Romania.

In 2000, Romania began accession talks with EU. In this context, the Commission identified the incentives as possibly not being in line with the EU State rules. In order to complete the accessions negotiations in relation to competition rules, Romania suddenly repealed the incentives with effect as from February 2005.

The arbitration proceedings

In summer 2005, the Micula brothers and three of their companies filed a request for arbitration under the rules of the International Centre for Settlement of Investment Disputes (ICSID: case ARB/05/20 Micula and Others v Romania). They argued that Romania’s premature revocation of the incentives in the manner that it took place was in breach of the fair and equitable treatment principle under the 2002 Sweden-Romania Bilateral Investment Treaty (BIT). They further argued that this premature revocation had caused them damage for which they had to be compensated.

On 11 December 2013, the arbitral tribunal awarded the arbitration claimants approx. 80 million euros plus interest (i.e. at least 178 million euros at the date of the award). The award was upheld by an ICSID annulment committee in 2016. The Commission intervened as amicus curiae in the arbitration proceedings, claiming in substance that any compensation re-establishing the advantages of the incentives would constitute incompatible State aid under EU law. The Commission’s intervention was likely at least partly motivated by the political decision to challenge the validity of all intra-EU BITs.

As the Micula brothers sought to enforce the ICSID award, the Commission issued a suspension injunction to prevent Romania from making any payment under the award. On 30 March 2015, the Commission adopted its final decision, finding that the payment of compensation under the ICSID award would constitute incompatible State aid under EU rules. It further ordered Romania to recover any amounts already paid to the arbitration claimants.

The GCEU’s judgment
In its ruling, the GCEU upheld the applicants’ argument that the Commission lacked jurisdiction (“competence”) to apply EU State aid rules in the present case. This is because Romania’s internationally wrongful acts and all material events which resulted in the arbitral award, including the repeal of the incentives and the initiation of the arbitration proceedings, occurred before Romania’s accession to the EU on 1 January 2007. For the GCEU, the right to receive compensation arose at the time when Romania repealed the incentives in 2005, i.e. pre-accession. The 2013 award was merely an ancillary element of the compensation at issue, and could not be classified as new aid and serve as a basis of the Commission’s competence. This specific factual background is also what distinguished this case from the famous Achmea case, in which the Court of Justice of the EU ruled that the arbitration clause in an intra-EU BIT was contrary to EU law.

For the GCEU, the Commission’s conclusion that the payment of the compensation constituted State aid was underpinned by the idea that the incentives were themselves incompatible with EU law. But they were repealed in 2005, so the Commission was simply not competent to assess them under EU law, at least with regard to the period predating accession. The Commission could not retroactively exercise its powers to a situation which occurred pre-accession.

The Commission had also argued, to defend its competence, that the damages had been calculated from 2005 to 2009, and so included a post-accession period. The GCEU considered it did not have to rule on whether the assessment could be different for the post-accession period. Even assuming that the payment of compensation for the post-accession period could be classified as incompatible aid, given that the Commission did not draw any distinction between the periods of compensation in its decision, it had, in any event, exceeded its powers.

The GCEU also upheld a second argument put forward by the applicants, namely that the compensation in question did not confer any advantage to the recipients. This is one of the cumulative conditions that must be met for any Member State measure to qualify as State aid. Damages are in principle not State aid under EU law, unless they compensate for the withdrawal of a measure which constitutes itself incompatible State aid. As the Commission was not competent to assess the incentives for the pre-accession period, the compensation for that period cannot be regarded as compensation for the withdrawal of aid which is incompatible with EU law. As with the first plea that was upheld, the Commission made no distinction between pre and post-accession compensation, so its decision classifying the entirety of compensation as aid was necessarily unlawful.

**Conclusion**

This ruling bring valuable clarifications on the interaction between BITs and State aid rules.

On substance, the GCEU confirmed something which might have seemed obvious, but apparently was not for the Commission: the latter is simply not competent to apply EU law in a situation where all relevant events predate accession. In such a situation, an arbitral award would simply retroactively produce effects which were already established before accession.

This was simply not the right case for the Commission to try and show that intra-EU BITs can result in awards that are contrary to EU law, and State aid rules in particular. In the present case, all relevant events occurred before Romania’s accession to the EU. The BIT was unquestionably an agreement between a Member State (Sweden) and a third country (Romania), at that time. Consequently, the issue of the continuing validity of intra-EU BITs in the post-accession period does not arise.

It should be noted this ruling may not be the end of the case. The Commission is likely to appeal the GCEU decision before the Court of Justice of the EU (only on points of law). It may also adopt a new decision, taking into account the GCEU’s judgment.

In addition, should the Commission appeal and the Court of Justice uphold such an appeal, the remainder of the applicants’ pleas would have to be assessed, either by the Court of Justice itself, or by the GCEU upon referral back by the Court of Justice. And there are many interesting pleas raised by the applicants which were simply not assessed (e.g. the applicability of Article 351 TFEU governing the rights and obligations arising from international agreements concluded before 1 January 1958 or, for acceding Member States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other). In such a case, a new appeal would of course be possible. So stay tuned!

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